

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

SHAWN HENRY WILLIAMS,

Defendant-Appellee.

UNPUBLISHED

April 22, 2008

No. 277006

Oakland Circuit Court

LC No. 05-206081-FH

Before: Kelly, P.J., and Owens and Schuette, JJ.

PER CURIAM.

Defendant pleaded guilty to possession with intent to deliver 50 grams or more but less than 450 grams of heroin, MCL 333.7401(2)(a)(iii), felon in possession of a firearm, MCL 750.224f, and two counts of possession of a firearm during the commission of a felony, second offense, MCL 750.227b. He was sentenced as a third habitual offender, MCL 769.11, to concurrent prison terms of 4 to 40 years for the drug conviction and one to ten years for the felon in possession conviction, those sentences to be served consecutively to two concurrent five-year terms of imprisonment for the felony-firearm convictions. The prosecutor appeals by delayed leave granted, challenging the trial court's downward departure from the sentencing guidelines range for the drug offense. We vacate defendant's sentence for possession with intent to deliver heroin and remand for further proceedings. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Pursuant to a *Cobbs* agreement, defendant entered guilty pleas, requesting a downward departure from the sentencing guidelines minimum range. The trial court advised defendant that he would be allowed to withdraw the pleas if it could not depart from the guidelines, pursuant to *People v Cobbs*, 443 Mich 276, 283; 505 NW2d 208 (1993). The guidelines range for defendant's drug conviction, as enhanced for a third habitual offender, was 99 to 240 months. MCL 777.21(3)(b); MCL 777.63. The trial court imposed a minimum sentence of 48 months, citing as substantial and compelling reasons the lack of violence, the fact that the sentence was required to be served consecutively to both the felony-firearm sentences and a sentence in a prior case for which defendant was on parole when he committed the instant offenses, and "judicial economy."

A trial court must impose a minimum sentence within the sentencing guidelines range unless a departure from the guidelines is permitted. MCL 769.34(2). The court may depart from the guidelines if it "has a substantial and compelling reason for that departure and states on the

record the reasons for departure.” MCL 769.34(3). “The court may depart from the guidelines for nondiscriminatory reasons where there are legitimate factors not considered by the guidelines or where factors considered by the guidelines have been given inadequate or disproportionate weight.” *People v Armstrong*, 247 Mich App 423, 425; 636 NW2d 785 (2001); MCL 769.34(3)(a), (b).

“[T]he Legislature intended “substantial and compelling reasons” to exist only in exceptional cases.” *People v Fields*, 448 Mich 58, 68; 528 NW2d 176 (1995). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum sentence range under the guidelines. *People v Babcock*, 244 Mich App 64, 75; 624 NW2d 479 (2000). Objective and verifiable factors are “actions or occurrences that are external to the minds of the judge, defendant, and others involved in making the decision, and must be capable of being confirmed.” *People v Abramski*, 257 Mich App 71, 74; 665 NW2d 501 (2003). A departure is appropriate “if there are substantial and compelling reasons that lead the trial court to believe that a sentence within the guidelines range is not proportionate to the seriousness of the defendant’s conduct and to the seriousness of his criminal history,” such that a departure would result in “a more proportionate criminal sentence than is available within the guidelines range.” *People v Babcock*, 469 Mich 247, 264; 666 NW2d 231 (2003).

In reviewing a departure from the sentencing guidelines range, we review the existence of a particular factor supporting a departure for clear error, the determination whether the factor is objective and verifiable de novo, and whether a reason is substantial and compelling for an abuse of discretion. *Babcock, supra*, 469 Mich 264-265. “An abuse of discretion occurs when the trial court chooses an outcome falling outside the permissible principled range of outcomes.” *Id.* at 274.

The first factor cited by the court is the lack of violence. To the extent the court was referring to the circumstances of this case, that is an objective factor verified by the presentence report and the preliminary examination testimony. However, the fact that defendant did not resort to violence is taken into account by the zero-point scores for offense variables 1, MCL 777.31 (aggravated use of weapon), and 3, MCL 777.33 (physical injury to victim), and the trial court made no finding that these factors had been given inadequate weight. To the extent the court was referring to the fact that defendant had not been convicted of any assaultive crimes previously, that is an objective factor verified by the presentence report. However, in light of defendant’s extensive criminal history, which includes repeated convictions for weapons offenses, the fact that he has not yet resorted to physical violence is not so exceptional to overcome the presumptive proportionality of the minimum sentence recommended by the guidelines.

The second factor cited by the court is that defendant was subject to consecutive sentencing. This is an objective factor verified by the record, but does not warrant a departure from the guidelines. Consecutive sentencing statutes were enacted for the purpose of deterring criminal behavior. In the case of an offense committed on parole, the purpose is to deter persons convicted of one crime from committing other crimes. *People v Phillips*, 217 Mich App 489, 499; 552 NW2d 487 (1996). In the case of felony-firearm, the purpose is to deter the use of guns as well as the underlying felony. *People v Moore*, 470 Mich 56, 62; 679 NW2d 41 (2004); *People v Dillard*, 246 Mich App 163, 171; 631 NW2d 755 (2001). A downward departure from

the guidelines because of consecutive sentencing considerations undermines the purpose of the statutes by rewarding defendant for his persistent criminal behavior and thus is not a valid basis for departure.

The third factor cited by the trial court is judicial economy, stating that it did not “have the luxury of spending forever on these cases.” Defendant pleaded guilty pursuant to a *Cobbs* agreement, and the trial court was clearly referring to the additional time it would take to try this case if the *Cobbs* agreement were not employed. Although docket congestion is a factor that is objective and verifiable, it is not relevant to the “seriousness of the defendant’s conduct and to the seriousness of his criminal history,” leading to “a more proportionate criminal sentence than is available within the guidelines range.” *Babcock, supra*, at 247. It is not a substantial and compelling reason for departure in this case.

Because the factors cited by the court did not establish a valid basis for a departure from the guidelines, we vacate defendant’s sentence and remand for resentencing. If the trial court cannot articulate a substantial and compelling reason for such an extensive departure from the guidelines, it shall permit defendant to withdraw his plea. *Cobbs, supra* at 283.

We vacate defendant’s sentence and remand for further proceedings consistent with this opinion. Jurisdiction is not retained.

/s/ Kirsten Frank Kelly
/s/ Donald S. Owens
/s/ Bill Schuette